SUPREME COURT OF INDIA

Kantilal Babulal

Vs.

H. C. Patel

C.A.No.126 of 1966

(K. N. Wanchoo, C.J.I., R. S. Bachawat, V. Ramaswami, G. K. Mitter and K. S. Hegde, JJ.)

29.09.1967

JUDGEMENT

HEGDE, J.:-

1. The main controversy in this appeal by certificate is as to the constitutional validity of Section 12A (4) of the Bombay Sales Tax Act. 1946, to be hereinafter referred to as the Act. As in our judgment that provision is void, the same being violative of Article 19 (1) (f) of the Constitution, we have not thought it necessary to examine the other contentions raised in the appeal.

2. The facts material for the purpose of deciding the question formulated above, are these: The appellants are dealers registered under the Act carrying on business in art silk, cotton and handloom cloth. During, the period January 26, 1950 to March 31, 1950, the appellants effected various sales outside the State of Bombay. As those sales were protected by Article 286 (1) (a) of the Constitution, they were outside the reach of the Act. But yet the sales tax officer assessed the turnover relating to those sales. The tax levied in respect of that turnover was Rs. 4,494-3-9. In appeal, the order of the sales tax Officer was affirmed by the Assistant Collector of sales tax. But the

Additional Collector of sales tax, in revision revised the levy to some extent and ordered a refund of Rs. 2,238-0-6. That amount was paid to the assessees. Not being satisfied with the order of the Additional Collector of sales tax, the appellants took up the matter in revision to the Sales Tax Appellate Tribunal. But even before they moved the tribunal in revision, the Additional Collector of sales tax by his letter dated May 17, 1958, informed the appellants that unless they furnished to the sales tax Officer proof of their having refunded the amount Paid to them in pursuance of his order to the purchasers within a period of three months from the date of that notice, the same would be liable to be forfeited under Section 12A (4). The tribunal by its order dated November 26, 1958, allowed the claim of the appellants in full and directed the refund of an additional sum of Rs. 2,256-2-6.

3. During the period April 1, 1950 to March 31, 1951 the appellants effected various sales outside the State of Bombay. The turnover relating to those sales was also brought to tax by the sales tax Officer and in that connection a tax of Rs. 23,806-3-6 was levied on the appellants. In appeal, the assistant collector of sales tax allowed the appellants' claim in part alla ordered a refund of Rs. 12,154-15-0 but at the same time he informed them that that amount would be forfeited to the State Government if not refunded to the purchasers from whom the same had been collected. Not being satisfied with the relief obtained, the appellants went up in revision to the additional collector of sales tax. That officer by his order dated November 1, 1958 granted further relief by ordering refund of an additional sum of Rs. 3,588-1-9. But the sales tax officer did not give effect to that order. As the additional collector did not accept the appellants claim in full, they went up in revision to the tribunal. The tribunal allowed their claim in full. The Revenue took up the matter in reference to the High Court but that reference was rejected. From the foregoing it is seen that in respect of the period April 1, 1950 to March 31, 1951, the appellants are entitled to get a refund of Rs. 23,806-3-6 Despite the aforementioned orders, the sales tax officer did not pay the amounts ordered to be refunded. On the other hand, he threatened to take steps to forfeit the same by having recourse to Section 12A (4).

4. On June 27, 1962, the sales tax Officer called upon the assessees to remain present in their office on July 2, 1962 with particulars of the amount collected by them by way of sales tax from the purchasers in other States during the period January 26, 1950 to March 31, 1951. At that stage, the appellants approached the High Court of Gujarat by special civil application No. 641 of 1962 under Article 226 of the Constitution. In that application, they prayed for several reliefs, the most important of which was to direct the respondents to comply with the orders of refund and to refrain from taking any action against them under Sec. 12A (4) The High Court dismissed that application. Hence, this appeal.

5. The Act provides for the levy of tax on the sale of goods in the then State of Bombay. It came into force on March 8, 1946. Any person who carries on business of selling or supplying goods in the State of Bombay whether for commission, remuneration or otherwise, is defined as a 'dealer' in Section 2 (c). Section 8 and Section 8 (a} of the Act provide for the registration of dealers. As mentioned earlier the appellants are registered dealers. Under Sec. 2 (k) of the Act, the assessment year is the financial year. Section 5 prescribes the incidence of taxation. Section 10 prescribes the returns to be made by the dealers. The assessment is made under Section 11 Section 11 (a) provides

for taxing the turnover escaping assessment. Section 12 provides for the payment and recovery of tax. Section 12A is the one with which we are concerned in this appeal. It reads:

"(1) No person shall collect any amount by way of tax under this Act in respect of sales or supplies of any goods which are declared, from time to time, under section 7 as sales or supplies on which the tax is not payable.

(2) No person selling or supplying any goods shall collect from the purchaser any amount by way of sales tax unless he is a registered dealer and is liable to pay tax under this Act in respect of such sale or supply:

Provided that this sub-section shall not apply in cases where a person is required to collect such amount of tax separately in order to comply with the conditions and restrictions imposed on him under the Provisions of any law for the time being in force.

(3) Every registered dealer whose gross turnover exceeds Rs. 60,000 a year shall issue a bill or cash memorandum signed and dated by him or his servant, manager or agent to the purchaser in respect of the goods sold or supplied by him showing the particulars of the goods and the price at which the goods are sold or supplied, shall keep the counterfoil or duplicate of such bill or cash memorandum-duly signed and dated and preserve it for a period of not less than two years from such date.

(4) If any person collects any amount by way of tax in contravention of the provisions of sub-section (1) or (2) or if any registered dealer collects any amount by way of tax in excess of the amount payable by him under this Act, the amounts so collected shall, without prejudice to any prosecution that, may be instituted against such person or dealer for an offence under this Act be forfeited to the State Government and such person or dealer, as the case may be shall within the prescribed period, pay such amount into a Government treasury and in default of such payment, the amount shall he recovered as an arrear of land revenue."

6. In view of Article 286 (1) (a) of the Constitution as it stood at the relevant time, the appellants' sales outside the State of Bombay were not exigible to tax. Therefore if the appellants had collected any amount from their purchasers in respect of those sales by way of tax they had undoubtedly contravened sub-section (2) of Section 12A. Sub-section (4) of Section 12A provides for the forfeiture to State Government any amount collected by a dealer by way of tax in excess of the amount payable by him under the Act. For the purpose of deciding the point in issue, it is not necessary to find out the scope of the expression "collects any amount by way of tax" in Sec. 12A (4). We shall assume, without deciding, the collection made by the appellants if any, was by way of tax.

7. It was not contended nor could it have been contended that the impugned provision is a taxation measure bringing to tax directly or indirectly the sales effected outside the State of Bombay In Abdul Quader and Co. v. Sales Tax Officer, Hyderabad, (1964) 6 SCR 867 = (AIR 1964 SC 922) Interpreting S. 11 (2) of the Hyderabad General Sales Tax Act 1952, a provision somewhat similar to the impugned provision, this Court observed that legislation under entry 54 of list II of the Constitution (similar to entry 48 of list II of the Government of India Act 1935, the entry with which we are concerned in this case) proceeds on the basis that the amount concerned is not a tax exigible under the law made under that entry, but even so lays down that though it is not exigible under the law, it shall be paid over to the government merely because some dealers by mistake or otherwise have collected it as tax; hence, it is difficult to see how such a provision can be ancillary or incidental to the collection of tax legitimately due under a law made under the relevant taxing entry. Therein it was held that it cannot be said that the State legislature was, directly legislating for the imposition of sales or purchase tax under entry 54 of list II when it made the provisions of Section 11 (2), for on the basis of the provision the amount that was collected by way tax was not exigible as tax under the law.

8. According to the Revenue S. l2A (4) a penal provision; and it provides for the imposition of penalty on those who contravene Section 12A (1) and (2). It was said on its behalf that power to enact such a provision is incidental to the power to tax sales. In support of that contention reliance was placed on the decision of the Gujarat High court in Ram Gopal v. Sales Tax Officer, Surat, (1965)16 STC l005(Guj.). That decision upheld the validity of Sec. 12A (4). If that decision lays down the law correctly then the appellants are out of court. But we think that the said decision cannot be sustained.

9. We shall not go into the question whether from the language of the impugned provision it is possible to hold that it is a penal provision for our present purpose we shall assume it to be so. We all also assume that the legislature had legislative competence to enact that provision. But the question is whether it is violative of Article 19 (1) (f) which guarantees the freedom to hold property. Prima facie the appellants are entitled to get the amount ordered to be refunded to them. It is for the respondents to establish that the same is liable to be forfeited. Even according to the respondents that amount can be forfeited only as a measure of penalty for the contravention of section 12A (1) and (2). Under our jurisprudence no one can be penalised without a proper enquiry. Penalising a person without an enquiry is abhorrent to our sense of justice. It is a violation of the principles of natural justice which we value so much.

10. The impugned provision which provides for the forfeiture of the amount in the hands of the dealers, does not lay down any procedure for ascertaining whether in fact the dealer concerned had collected ary amount by way of tax from his purchasers outside the State and if so what that amount is. Neither Section 12A (4) nor any rule framed under the Act contemplates any enquiry much less a reasonable enquiry in which the person complained of can plead and prove his case or satisfy the authorities that their assumptions are either wholly or partly wrong.

11. The Act is silent as to the machinery and procedure to be followed in determining the question as to whether there has been a contravention of Sections 12A (1) and (2), and If so, to what extent. Hence it would be open to the department to evolve all the requisite machinery and procedure which means that the whole thing, from the beginning to end, is treated as of a purely administrative character, completely ignoring the legal position. The imposition of a penalty on a person is at least of a quasijudicial character.

12. The impugned provision does not concern itself only with the amount admittedly collected by a person in contravention of sub-sections (1) and (2) of Sec. 12A. Even if there is any dispute either as to the factum of collection or as to the amount collected, such a case also comes within the scope of Section 12A (4). Yet that section does not provide for any enquiry ton disputed questions of fact or law. The forfeiture provided for in Section 12A (4) prima facie infringes Article 19 (1) (f). Therefore it is for the respondents to satisfy the Court that the impugned provision is a reasonable restriction imposed in the interest of the general public.

13. Section 12A (4) does not contemplate the making of any order. As mentioned earlier, that section prescribes that if any registered dealer collects any amount by way of tax in excess of the amount payable by him under the Act, the amount so collected shah, without prejudice to any prosecution that may be instituted against him for an offence under the Act, be forfeited to the State Government and he shall within the prescribed period pay such amount into a government treasury and in default of such payment the amount shall be recovered arrears of land revenue This section does not contemplate adjudication. Nor does it provide for making any order. Hence, it is doubtful whether any appeal can be filed against a demand made under that Section under Section 21.

14. The question whether appellants in the instant case had been afforded a reasonable opportunity to establish their case or not is beside the point. The constitutional validity of a provision has to be determined on construing it reasonably. If it passes the test of reasonableness, the possibility of powers conferred being improperly used, is no ground for pronouncing it as invalid, and conversely if the same properly interpreted and tested in the light of the requirements set out in Part III of the Constitution does not pass the test, it cannot be pronounced valid merely because it is being administered in the manner which might not conflict with the constitutional requirements. On a reasonable interpretation of the impugned provision, we have no doubt that the power conferred under Section 12A (4) is unguided; uncanalised and uncontrolled. It is an arbitrary power. As held by this Court in Dr. N. B. Khare v. State of Delhi, 1950 SCR 519 = (AIR 1950 SC 211), whether the restrictions imposed by a legislative enactment upon a fundamental right guaranteed by Article 19 (1) are reasonable within the meaning of Article 19 (5) would depend as much on the procedural portion of the law as the substantive part of it. That view was reiterated by this Court in State of Madras v. V. G. Rao, 1952 SCR 597 = (AIR 1952 SC 196) wherein it was observed that in considering the reasonableness of laws imposing restrictions on fundamental rights both the substantive and procedural aspects of the impugned law should be examined from the point of view of reasonableness. This Court has taken that view consistently. A provision like the one with which we are concerned in this case can hardly be considered reasonable

15. For the reasons mentioned above this appeal is allowed. The order of the High Court is set aside and a writ of mandamus will be issued to the respondents to comply with the refund orders set out in the petition filed before the High Court and to refrain from proceeding against the appellants under Section 12A (4). The appellants are entitled to their costs both in this Court and in the High Court.

Appeal allowed.